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| PRE-APPEAL BRIEF REQUEST FOR REVIEW | | Docket Number (Optional) 101.0093-01000 | |
| I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed name _____ | | Application Number 10/675,820 | Filed September 30, 2003 |
| | | First Named Inventor Gary K. Michelson | |
| | | Art Unit 3733 | Examiner James Swiger III |
| Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided. | | | |
| I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/06) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>34,383</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____ | |  Signature Thomas H. Martin Typed or printed name (330) 877-0700 Telephone number April 20, 2007 Date | |
| NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*. | | | |
| <input checked="" type="checkbox"/> Total of <u>1</u> forms are submitted. | | | |

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEE OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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RESPONSE UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 3733

PATENT
Attorney Docket No. 101.0093-01000
Customer No. 22882

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|---------------------------|---|--------------------------------|
| In re Application of: |) | Confirmation No.: 6670 |
| Gary K. Michelson |) | |
| Serial No.: 10/675,820 |) | Group Art Unit: 3733 |
| Filed: September 30, 2003 |) | Examiner: James L. Swiger, III |
| For: DYNAMIC GUARD |) | |
| |) | |

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

In reply to the Final Office Action of February 12, 2007 and subsequent Advisory Action of April 11, 2007, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

I. Brief Background

The application includes one independent claim, claim 1, generally drawn to a guard for use in human spinal surgery. Independent claim 1 stands rejected under 35 U.S.C. § 102(e). The rejection of claim 1 under 35 U.S.C. § 102(e) is the subject of this Request for a Pre-Appeal Conference.

II. Clear Errors

(1) The Examiner's rejection of claims 1-28 under 35 U.S.C. § 102(e) as being unpatentable over U.S. Publication No. 2003/0135220 to Cauthen ("Cauthen") is erroneous because:

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(a) independent claim 1 recites a guard with a body having a first portion and a second portion, where said first and second portions define an opening for providing a protected pathway to adjacent vertebral bodies and a disc space therebetween, and are "pivotal about an axis that passes through at least a portion of the pathway";

(b) as shown in Figs. 2-5, 13 and 14, for example, the guard of the present application is generally indicated the numeral 100, and includes a body 102 with a first portion 104 and a second portion 106 which define an opening for providing a protected pathway through guard 100 to adjacent vertebral bodies and a disc space therebetween, and are pivotal about a hinge 120 having a pivot axis that passes through a portion of the pathway;

(c) Cauthen teaches an insertion instrument (10) of Figs. 1 and 2 having a hollow body (12), and a handle (18) with a guide (20) extending therefrom pivotal about an articulating hinge (22), where hinge (22) has a pivot axis disposed on the exterior of hollow body (22);

(d) Cauthen teaches an insertion instrument (10) of Figs. 13 and 14 having a hollow body, and a handle (18) with an associated guide (20) and a handle (37) with an associated guide (35) pivotal about articulating hinges (22) and (36), respectively, where hinges (22) and (36) have pivot axes disposed on the exterior of the hollow body;

(e) handle (18) and guide (20) in Figs. 1 and 2 of Cauthen, and handles (18) and (37) and associated guides (20) and (35), respectively, in Figs. 13 and 14 of Cauthen pivot about axes that lie outside any pathway through insertion instrument (10) leading to adjacent vertebral bodies and a disc space therebetween (underline added only for emphasis);

(f) accordingly, Cauthen does not teach or suggest a guard with a body having a first portion and a second portion, where said first and second portions define an opening for providing a protected pathway to adjacent vertebral bodies and a disc space therebetween, and are pivotal about an axis that passes through at least a portion of the pathway; and

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(g) because Cauthen does not teach or suggest a guard as recited in independent claim 1, claim 1 is patentable over the Examiner's rejection, and claims 2-30 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

III. Conclusion

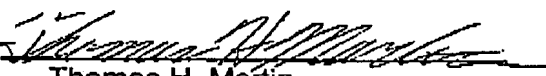
In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: April 20, 2007

By: 
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